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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-31 (Sub No. 38)]

CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment—Canadian National Railway Company and Grand Trunk Western Railroad Inc.

On April 24, 2001, CSX Corporation and CSX Transportation, Inc. (collectively, CSX) filed an adverse application under 49 U.S.C. 10903 requesting that the Surface Transportation Board (Board) authorize the abandonment by Canadian National Railway Company (CNR)<sup>1</sup> and its wholly owned affiliate Grand Trunk Western Railroad Incorporated (GTW), of a portion of a rail line known as Track No. 239 extending from milepost 26.4 to milepost 27.0 near 43rd Street and Damen Avenue, in Chicago, Cook County, IL, a distance of 2,952 feet. The track is situated on property leased from New York Central Lines, L.L.C. (NYC). The line traverses United States Postal Service ZIP Code 60609 and includes no stations. In the alternative, CSX seeks an order of adverse discontinuance against GTW's operations on the line.

CSX indicates that it filed the adverse abandonment application so that it could proceed with plans to utilize the track to service its new 59th Street intermodal facility. CSX asserts that serious congestion problems near its facility have magnified its need to

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<sup>1</sup> GTW states in its February 21, 2001 Reply to CSX's Petition for Waiver that it owns Track 239 and contends that CNR is not a proper party to this proceeding. That contention would properly be the subject of a motion to dismiss accompanied by supporting evidence.

access and control the right-of-way. CSX maintains that GTW ceased using the line in 1996. Under its Operating Agreement with NYC, CSX Transportation, Inc. is the operator of the leased property and the entity with rights to enforce the lease, acquired as part of CSX's acquisition of certain assets of Consolidated Rail Corporation (Conrail). CSX asserts that, although it has trackage rights over the line, GTW has not allowed it to make necessary changes to utilize the track, has refused in recent years to make rent payments due under the lease agreement, and has refused to vacate the premises. CSX seeks to enforce a termination clause contained in the lease under state law.<sup>2</sup> This agency and its predecessor have long held that granting an adverse abandonment application would remove this agency's primary jurisdiction over the line, thereby subjecting the line to actions under state law.<sup>3</sup>

In a decision served in this proceeding on March 2, 2001, CSX was granted a waiver from many of the filing requirements of the Board's abandonment regulations at 49 CFR 1152 that were not relevant to its adverse abandonment application. Specifically,

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<sup>2</sup> Conrail exercised its lease termination rights to recover possession of the underlying land by giving 30 days' notice. It also sought possession of the track, pursuant to lease terms that allowed CSX to retain improvements on the property if GTW fails to remove all improvements within 10 days after the lease is terminated. Specifically, in May 2000, CSX filed a forcible entry and detainer action against GTW in the U.S. District Court for the Northern District of Illinois, CSX Transportation, Inc. v. Canadian National Railway Co., et al., Case No. OOC 1462 (N.D. Ill.). The District Court granted defendants' motion to dismiss concluding that the Board has exclusive jurisdiction to determine whether the track is subject to its regulatory jurisdiction.

<sup>3</sup> See Modern Handcraft, Inc.—Abandonment, 363 I.C.C. 969 (1981); Kansas City Pub. Ser. Frgt. Operations Exempt.—Aban., 7 I.C.C.2d 216, 224-26 (1990); and Chelsea Property Owners—Aban.—The Consol. R. Corp., 8 I.C.C.2d 773, 778 (1992), aff'd sub nom. Conrail v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

CSX was granted waiver from the notice requirements at 49 CFR 1152.20(a)(2)(i) and the content requirements at 49 CFR 1152.22(a)(5), (b), (c), (d), (e)(1), (e)(2), (e)(4), and (g). However, CSX was required to comply with the notice requirements at 49 CFR 1150.20(a)(1), (a)(2) and (b)(1) and 1152.21, the content requirements at 49 CFR 1152.22(e)(3), and the filing and service requirements at 1152.24(b). Also, the Board did not waive the environmental regulations at 49 CFR 1152.22(f).

CSX states that, to the best of its knowledge, the line does not contain federally granted rights-of-way. Any documentation in CSX's possession will be made available promptly to those requesting it. The applicant's entire case in chief for abandonment was filed with the application, and it describes alternative routing options that will be available to GTW should the application be granted.

The interests of railroad employees will be protected by the conditions set forth in Oregon Short Line R. Co.-Abandonment-Goshen, 360 I.C.C. 91 (1979).

Any interested person may file written comments concerning the proposed abandonment or protests (including protestant's entire opposition case) by June 8, 2001. All interested persons should be aware that, following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (49 CFR 1152.28) or for a trail use condition under 16 U.S.C. 1247(d) (49 CFR 1152.29) must be filed by June 8, 2001. Each trail use request must be accompanied by a \$150 filing fee. See 49 CFR 1002.2(f)(27). However, in its application, CSX seeks an exemption from the following statutory provisions: 49 U.S.C. 10903(a)(2)(C), which requires a statement

concerning interested subsidy or sale offers; section 10904, which relates to offers of financial assistance for the purchase of or subsidy for a rail line proposed for abandonment; and section 10905, which relates to offers for sale for public purposes of abandoned rail properties. These requests will be addressed in the decision on the merits.<sup>4</sup> The due date for applicant's reply is June 25, 2001.

Persons opposing the proposed adverse abandonment who wish to participate actively and fully in the process should file a protest. Persons who may oppose the abandonment but who do not wish to participate fully in the process by submitting verified statements of witnesses containing detailed evidence should file comments. Parties seeking information concerning the filing of protests should refer to section 1152.25.

All filings in response to this notice must refer to STB Docket No. AB-31 (Sub-No. 38) and must be sent to: (1) Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001; and (2) David Coburn, Steptoe & Johnson LLP, 1330 Connecticut Av., NW, Washington, DC 20036-1795. The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

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<sup>4</sup> CSX also requests an exemption from statutory requirements at 49 U.S.C. 10903(a)(3) and 10903(c). However, because the Board has already ruled on CSX's previous request for waivers from corresponding Board regulations, that portion of the request will be dismissed as moot.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565-1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152.

The March 2 decision noted that CSX had requested waiver from the environmental requirements of 49 CFR 1152.22(f), arguing that its proposal has no environmental impact and therefore qualifies for treatment under 49 CFR 1105.6(c). However, the March 2 decision indicated that CSX should make that showing in its application, rather than seeking a waiver.

In its application, CSX asserts that the proposal is analogous to the discontinuance of trackage rights where the affected line will continue to be operated and, consequently, is exempt from environmental review under 49 CFR 1105.6(c). Nonetheless, CSX has prepared an Environmental Report in consultation with the Board's Section of Environmental Analysis (SEA). On the basis of that report, CSX urges the Board to find that a grant of this application will not have any significant or adverse environmental impacts. Questions concerning environmental issues may be directed to SEA at (202) 565-1545. [TDD for the hearing impaired is available at 1-800-877-8339.]

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Decided: May 8, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary